

SUPREME COURT OF INDIA

Boothalinga Agencies

Vs.

V. T. C. Poriaswami Nadar

C.A.No.479 of 1965

(J. C. Shah, V. Ramaswami and G. K. Mitter, JJ.)

22.04.1968

JUDGEMENT

RAMASWAMI, J.:-

1. This appeal is brought, by certificate, from the judgment of the Madras High Court dated March 16, 1962 in A. S. No. 367 of 1958.

2. The appellant carries on business in the manufacture and sale of coffee powder. He was for this purpose importing chicory under actual user's licence issued by the Government. The consignment of chicory in question was a consignment of 24-3/4 tons - 495 cases which arrived at Madras port by "S.S. Alwaki" in December, 1955. Exhibit B-9 was the licence under which the consignment was imported. The goods were cleared by the appellant on December 20, 1955. The case of the respondent was that the appellant agreed to sell the consignment to him under Ex. A-1 dated November 26, 1955 after taking an advance of Rs. 7,500. The contract was, however, entered into in the name of the find defendant and P. W. 2 acted as a broker in the transaction. The respondent paid another sum of Rs. 20,00 on December 23, 1955 after the goods arrived and were cleared on the

representation that the delivery would be given in one month. Defendant No. 1 executed a letter, Ex. A-2 in this connection but thereafter owing to rise in prices the appellant committed a default. The suit was contested by the first defendant on the ground that the contract was illegal and therefore void. The case of the second defendant was that he had nothing to do with the contract entered into between the plaintiff and the first defendant and, in any case, the contract for sale of chicory was illegal and void ab initio in contravention of the provisions of the licence granted to him for the import of chicory. The trial Court held, upon examination of the evidence, that both defendants 1 and 2 entered into the contract with the plaintiff to fulfil the terms of the contract. On the question of legality of the contract the Court held that as the contravention of the terms of the licence by the sale of the imported goods would entail only an administrative penalty, the sale cannot be held to be prohibited by law and the contract was therefore a legal contract binding on both the parties. The trial court found that the date of the breach of the contract was February 14, 1956 and granted a decree in favour of the plaintiff against both the defendants for a sum of Rs. 35,640. Two appeals were filed in the Madras High Court against the judgment of the trial court-A. S.No. 367 of 1958 by the second defendant and A. S. No. 363 of 1959 by the first defendant. The appeals were heard together by the High Court which by its judgment D/-16-3-1962 allowed the appeal of the first defendant A. S. No.363 of 1959 and dismissed the suit as against him. As regards the appeal filed by the 2nd defendant the High Court reduced the amount of damages to the sum of Rs. 23,265. The High Court agreed with the finding of the trial Judge that the contract for the sale of imported chicory was entered into by the respondent directly with the second defendant and the second defendant was liable for its breach. As regards the legality of the contract, the High Court took the view that it could not be regarded as a contract prohibited by any law and so it was valid and binding between the parties and the plaintiff could properly sustain an action for damages for its breach. The High Court further held that the real contract which the plaintiff had entered into was with the second defendant and the first defendant was only a dummy in whose name the contract was entered into for ulterior reasons.

3. The first question to be considered in this appeal is whether the contract was in violation of the restrictions placed by the Imports and Exports (Control) Act, 1947 and the notifications issued thereunder and in consequence whether it was void and illegal and whether a claim for breach of such a contract is maintainable.

4. It is necessary at this stage to refer to the terms of the licence, Ex. B-9 and to the relevant provisions of the statutes and the notifications.

5. Exhibit B-9 was issued on September 29, 1955 and reads as follows:

"Messrs. Boothalinga Agencies of 2/21 Dr. Vasudevan Road, Madras-10, are hereby authorised to import the goods of which particulars are given below:-

1. Country from which consigned- Soft currency licensing.

2. Country of origin.-Area/Not valid for South Africa.

3. Description of goods-Chicory.

4. Serial number and part of the I. T. C. Schedule-79, V/IV.

5. Quantity-24-3/4 tons.

6. Approximate value c. i. f. (in words) rupees thirty two thousand and two only (in figures) Rs. 32,002.

7. Period of shipment-Valid up to 31st March 1956 from the date of issue.

8. Limiting factor for purpose of clearance through Customs.

Quantity/value Both.

This licence is granted under Government of India, late Ministry of Commerce Notification No. 23-ITC/43, dated the 1st July 1943, as continued in force by the Imports and Exports (Control) Act 1947 (XVIII of 1947) and is without prejudice to the application of any other prohibition or regulation affecting the importation of the goods which may be in force at the time of their arrival.....

* * * * *

This licence is issued subject to the condition that the goods will be utilised only for consumption as raw material or accessories in the licence holder's factory and that no portion thereof will be sold to

any party.

Sd/-

For Chief Controller of Imports.

This licence was granted under Government of India, late Commerce Department Notification No. 23-ITC/43 dated July 1, 1943 made under Rule 84 (3) of the Defence of India Rules which was intended to "prohibit bringing into British India by sea, land or air from any place outside India of any the of the description specified in the schedule (hereto annexed) except the following.....

* * * * *

Sub-Clause XII:-Any goods of the description specified in Part IV of the Schedule which are covered by a special licence issued by an Import Trade Controller appointed in this behalf by the Central Government."

Imported chicory is one of the goods described in Part IV. The effect of the notification is that if there is special licence for the importing of chicory there would be no prohibition against its import Sections 3, 4 and 5 of the Imports and Exports (Control) Act, 1947 provided for the continuance of the notifications previously issued under the Defence of India Rules. Sections 3, 4 and 5 of that Act are to the following effect:

"8. Powers to prohibit or restrict imports and exports.- (1) The Central Government may, by order published in the Official Gazette, make provision for prohibiting, restricting or otherwise controlling, in all cases or in specified classes of cases, and subject to such exceptions, if any, as may be made by or under the order:-

(a) the import, export, carriage coastwise or shipment as ships' stores of goods of any specified description;

(b) the bringing into any port or place in British India of goods of any specified description intended to be taken out of British India without being removed from the ship or conveyance in which they

are being carried.

(2) All goods to which any order under sub-section (1) applies shall be deemed to be goods of which the import or export has been prohibited or restricted under section 19 of the Sea Customs Act, 1878, and all the provisions of that Act shall have effect accordingly, except that Section 183 thereof shall have effect as if for the word "shall" therein the word 'may' were substituted.

(3) Notwithstanding anything contained in the aforesaid Act, the Central Government may, by order published in the Official Gazette, prohibit, restrict or impose conditions on the clearance, whether for home consumption or for shipment abroad, of any goods or class of goods imported into British India.

(4) All orders made under rule 84 of the Defence of India Rules or that rule as continued in force by the Emergency Provisions (Continuance) Ordinance, 1946 and in force immediately before the commencement of this Act shall, so far as they are not inconsistent with the provisions of this Act, continue in force and be deemed to have been made under this Act.

(5) If any person contravenes any order made or deemed to have been made under this Act, he shall without prejudice to any confiscation or penalty to which he may be liable under the provisions of the Sea Customs Act, 1878, as applied by sub-section (2) of Sec. 3, be punishable with imprisonment for a term which may extend to one year, or with fine, or with both."

On March 6, 1948 the Central Government issued a notification under sub-rule (3) of Rule 84 of the Defence of India Rules which reads as follows:

" No. 2-ITC/48-In exercise of the powers conferred by sub-section (1) and sub-section (3) of Section 3 of the Imports and Exports (Control) Act, 1947 (XVIII of 1947) the Central Government is pleased to make the following order, namely,

(a) Any officer issuing a licence under clauses VIII to XIV of the Notification of the Government of India in the late Department of Commerce No. 23-ITC/ 43 dated the 1st July 1943, may issue the same subject to one or more of the conditions stated below:

(i) That goods covered by the licence shall not be disposed of or otherwise dealt with or without the written permission of the licensing authority or any person duly authorised by it.

(ii) That the goods covered by the licence on importation shall not be sold or distributed at a price more than that which may be specified in any directions attached to the licence.

(iii) That the applicant for a licence shall execute a bond for complying the terms subject to which a licence may be granted.

(iv) That the licence shall not be transferable except in accordance with the permission of the licensing authority or a person duly authorised by it.

(v) That such other conditions may be imposed which the licensing authority considers to be expedient from the administrative point of view and which are not inconsistent with the provisions of the said Act.

(b) Where a licensee is found to have contravened the order or the terms and conditions embodied in or accompanying a licence, the appropriate licensing authority or the Chief Controller of Imports may notify him that, without prejudice to any penalty to which he may be liable under the Imports and Exports (Control) Act 1947 (XVIII of 1947) or any other enactment for the time being in force, he shall either permanently or for a specified period, be refused any further licence for import of goods.

(c) Where an Importer is found guilty of contravention of the proviso to the said notification or of any orders or terms or conditions embodied in or accompanying a licence or an application for a licence or any other import trade control rules or regulations duly promulgated the appropriate licensing authority or the Chief Controller of Imports may notify him that, without prejudice to any penalty to which he may be liable under the Imports and Exports (Control) Act 1947 (XVIII of 1947) or any other enactment for the time being in force, he shall either permanently or for a specified period be refused any license for import of goods."

6. By Section 4 of Act 4 of 1960 there was an amendment of certain provisions of the Imports and Exports (Control) Act, 1947 (Act XVIII of 1947). By Sec. 4 of the Amending Act the words 'Or any condition of a licence granted under any such order' were introduced after the clause "any order made or deemed to have been made under this Act."

7. On December 7, 1955, the Imports (Control) Order was promulgated by the Central Government

in exercise of the powers conferred by Sections 3 and 4A of the Imports and Exports (Control) Act, 1947. Clause 3 of this Order prohibited import of goods except in accordance with a licence issued by specified authorities. Clause 5 authorised imposition of conditions under which goods could be imported. Clause 5 provides as follows:

"Conditions of Licence.- (1) The licensing authority issuing a licence under this Order may issue the same subject to one or more of the conditions stated below:

(i) that the goods covered by the licence shall not be disposed of, except in the manner prescribed by the licensing authority, or otherwise dealt with, without the written permission of the licensing authority or any person duly authorised by it;

(ii) that the goods covered by the licence on importation shall not be sold or distributed at a price exceeding that which may be specified in any directions attached to the licence;

(iii) that the applicant for a licence shall execute a bond for complying with the terms subject to which a licence may be granted.

(2) A licence granted under this Order may contain such other conditions, not inconsistent with the Act or this Order, as the licensing authority may deem fit,

(3) It shall be deemed to be a condition of every such licence, that:

(i) no person shall transfer and no person shall acquire by transfer any licence issued by the licensing authority except under and in accordance with the written permission of the authority which granted the licence or of any other person empowered in this behalf by such authority;

(ii) that the goods for the import of which a licence is granted shall be the property of the licensee at the time of import and thereafter upto the time of clearance through Customs;

(iii) the goods for the import of which a licence is granted shall be new goods unless otherwise stated in the licence.

(4.) The licensee shall comply with all conditions imposed or deemed to be imposed under this clause."

Notification No. 23-ITC/43 dated July 1, 1943 was repealed under clause 12 but the proviso to that clause saved the operation of all licences previously issued and stated but they must be deemed to be issued under the 1955 Order. Clause 12 reads as follows:

"12 Repeals. - The Orders contained in the notifications specified in Schedule IV are hereby repealed:

Provided that anything done or any action taken, including any appointment made or licence issued under any of the aforesaid Orders, shall be deemed to have been done or taken under the corresponding provision of this Order.

Schedule IV

Notifications repealed

1. Notification No. 23-ITC/43, dated the 1st July, 1943, issued by the late Department of Commerce, as amended.

2. Notification No. 2-ITC/48, dated 6th March, 1948, issued by the late Ministry of Commerce.

8. On the basis of these provisions was contended by Mr. Gokhale on behalf of the appellant that the contract which is the subject-matter of the suit was unlawful and the respondent cannot claim damages for breach of such a contract. It was not disputed by Mr. Gokhale that the contract between the parties was entered into on November 26, 1955 before the coming into force of the Imports (Control) Order. It was nevertheless argued that a breach of the conditions of the licence was punishable under Section 5 of Act XVIII of 1947 as it stood at the relevant time and therefore the contract was illegal and no claim for the breach thereof was maintainable. The contention of the appellant was that the contravention of the terms of the licence issued under the notification dated March 6, 1948 was a contravention of the notification itself within the meaning of Section 5 of Act

XVIII of 1947 and was punishable. We are unable to accept this argument as correct. It is clear that Section 5 before its amendment only penalised the contravention of any order made or deemed to have been made under the Act. It is true that a licence was granted by virtue of a statutory notification dated March 6, 1948 issued under the Defence of India Rules and later deemed to have been issued under Act XVIII of 1947. Notification No. 23N-ITC/43 dated July 1, 1943 merely provides that no goods shall be imported except the goods covered by special licences issued by an authorised officer. Notification No. 2. ITC/48 dated March 6, 1948 authorises the licensing officer to impose one or more conditions prescribed by that order and the licensing officer has therefore power to impose conditions in the licence issued by him, but if the licensee contravenes the conditions imposed by the licence it is difficult to hold that it is not merely a contravention of the conditions of a licence but there is contravention of the terms of the notification and so the provisions of Section 5 of Act XVIII of 1947 are attracted. Reference was made on behalf of the appellant to the amendment made to S. 5 of Act XVIII of 1947 by the Amending Act 4 of 1960. By the Amending Act Section 5 of Act XVIII of 1947 was amended so as to include contravention of a condition of a licence granted under any order as an offence under Section 5 of the Act. It is not, however, permissible, in the circumstances of the present case, to construe the language of Section 5 of the parent Act with the aid of the Amending Act (Act 4 of 1960). It is not possible for us to accept the contention of Mr. Gokhale that the Amending Act of 1960 is something in the nature of a Parliamentary exposition of the meaning of Section 5 as it stood in the parent Act. It follows therefore that on the material date a breach of the condition of a licence was not tantamount to a breach of the statutory order within the meaning of Section 5 of Act XVIII of 1947. The view that we have expressed is borne out by the decision of this Court in *East India Commercial Co. Ltd. Calcutta v. Collector of Customs, Calcutta*, (1963) 3 SCR 338 = (AIR 1962 SC 1893) in which it was held by the majority judgment that an infringement of the condition of a licence was not equivalent to an infringement of the two orders dated July 1, 1943 and March 6, 1948 i. e., Nos. 23 ITC/43 and 2-ITC/48 made under the Imports and Exports (Control) Act, 1947 and therefore the provisions of Section 167 (8) of the Sea Customs Act were not attracted. We accordingly reject the argument of Mr. Gokhale on this aspect of the case.

9. We pass on to consider the next contention put forward on behalf of the appellant, namely, that in any event the Imports (Control) Order, 1955 had come into force on December 7, 1955 and the performance of the contract became illegal after that date. It was pointed out that the goods arrived at the Madras port on December 13, 1955 and were cleared on December 20, 1955. Reference was made to the conditions imposed in the licence, Ex. B-9 that "the goods will be utilised only for consumption as raw material or accessories in the licence holder's factory and that no portion thereof will be sold to any party". It was contended that the appellant would be committing an offence under Sec. 5 of Act XVIII of 1947 if he sold the goods to the respondent in pursuance of the contract as the condition of the licence would be violated. In our opinion, the argument of the appellant is well founded and must be accepted as correct. It is manifest that the disposal of the imported chicory which arrived at Madras port on December 13, 1955 was governed by the provisions of the Imports (Control) Order, 1955 which came into force on December 7, 1955. Clause 5 (4) of the 1955 Order expressly provides that the licensee shall comply with all the conditions imposed or deemed to be imposed under that clause. Therefore the sale of the imported goods would be a direct contravention of Clause 5 (4) and under Section 5 of the Imports and Exports (Control) Act, 1947 any contravention of the Act or any order made or deemed to have been made under the Act is punishable with imprisonment up to one year or fine or both. In consequence, even though the contract was enforceable on November 26, 1955 when it was entered

into, the performance of the contract became impossible or unlawful after December 7, 1955 and so the contract became void under Section 56 of the Indian Contract Act after the coming into force of the Imports (Control) Order, 1955. Section 56 of the Indian Contract Act states:

"An agreement to do an act impossible in itself is void.

A contract to do an act which, after the contract is made, becomes impossible or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

10. The doctrine of frustration of contract is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. It should be noticed that Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties.

11. In English Law a case of supervening illegality is treated as an instance of frustration of contract. In *Metropolitan Water Board v. Dick Kerr and Co. Ltd.*, 1918 AC 119, under a contract made in July 1914, a reservoir was to be constructed and to be completed in six years from 1914 subject to a proviso that if the contractors should be impeded or obstructed by any cause the engineer should have power to grant an extension of time. Under the powers conferred by the Defence of the Realm Acts and Regulations, the contractors were obliged to cease work on the reservoir by order of the Ministry of Munitions in 1916. The House of Lords held that the contract was frustrated by supervening impossibility and that the provision for extending the time did not apply to the prohibition by the Ministry. Lord Finlay L. C. said that the interruption was "of such a character and duration that it vitally and fundamentally changed the conditions of the contract, and could not possibly have been in the contemplation of the parties to the contract when it was made." In a subsequent case-*Denny, Mott and Dickson Ltd. v. James B. Fraser and Co. Ltd.*, 1944 AC 265 a contract for the sale and purchase of timber contained an option for the appellants to purchase a timber yard (which was meanwhile let to them) if the contract was terminated on notice given by either party. By the Control of Timber (No. 4) Order, 1939, further trading transactions under the contract became illegal, but in 1941 the appellants gave notice to terminate the contract, and also to exercise their option to purchase the timber-yard. The House of Lords held that the option to purchase was dependent on the trading agreement, that the 1939 Order had operated to frustrate the contract, and that, consequently, the option to purchase lapsed upon the frustration since it arose

13. In English Law therefore the question of frustration of contract has been treated by courts as a question of construction depending upon the true intention of the parties. In contrast, the statutory provisions contained in S. 56 of the Indian Contract Act lay down a positive rule of law and English authorities cannot therefore be of direct assistance, though they have persuasive value in showing how English courts have approached and decided cases under similar circumstances.

14. Counsel on behalf of the respondent, however, contended that the contract was not impossible of performance and the appellant cannot take recourse to the provisions of Section 56 of the Indian Contract Act. It was contended that under Clause 1 of the Import Trade Control Order No. 2-ITC/48 dated March 8, 1948 it was open to the appellant to apply for a written permission of the licensing authority to sell the chicory. It is not shown by the appellant that he applied for such permission and the licensing authority had refused such permission. It was therefore maintained on behalf of the respondent that the contract was not impossible of performance. We do not think there is any substance in this argument. It is true that the licensing authority could have given written permission or disposal of the chicory under Clause 1 of Order 2-ITC/48 dated March 8, 1948 but the condition imposed in Ex. B-9 in the present case is a special condition imposed under Clause (v) of Paragraph (a) of Order No.

2-ITC/ 48 dated March 6, 1948 and there was no option given under this clause for the licensing authority to modify the condition of licence that "the goods will be utilised only for consumption as raw material or accessories in the licence holder's factory and that no portion thereof will be sold to any party". It was further argued on behalf of the respondent that, in any event, the appellant could have purchased chicory from the open market and supplied it to the respondent in terms of the contract. There is no substance in this argument also. Under the contract the quality of chicory to be sold was chicory of specific description- "Egberts Chicory, packed in 495 wooden cases, each case containing 2 tins of 58 lb nett". The delivery of the chicory was to be given by S. S. Alwaki" in December, 1955. It is manifest that the contract, Ex. A-1 was for sale of certain specific goods as described therein and it was not open to the appellant to supply chicory of any other description. Reference was made on behalf of the respondent to the decision in *Maritime National Fish Ltd. v. Ocean Trawlers, Ltd.*, 1935 AC 524. In that case, the respondents chartered to the appellants a steam trawler fitted with an otter trawl. Both parties knew at the time of the contract that it was illegal to use an otter trawl without a licence from the Canadian Government. Some months later the appellants applied for licences for five trawlers which they were operating, including the respondents' trawler. They were informed that only three licences would be granted, and were requested to state for which of the three trawlers they desired to have licences. They named three trawlers other than the respondents', and then claimed that they were no longer bound by the charter-party as its object had been frustrated. It was held by the Judicial Committee that the failure of the contract was the result of the appellants own election, and that there was therefore no frustration of the contract We think the principle of this case applies to the Indian law and the provisions of Section 56 of the Indian Contract Act cannot apply to a case of "self induced frustration ." In other words, the doctrine of frustration of contract cannot apply where the event which is alleged to have frustrated the contract arises from the act or election of a party. But for the reasons already given, we hold that this principle cannot be applied to the present case for there was no choice or election left to the appellant to supply chicory other than under the terms of the contract. On the other hand, there was a positive prohibition imposed by the licence upon the

appellant not to sell the imported chicory to any other party but he was permitted to utilise it only for consumption as raw material in his own factory. We are accordingly of the opinion that Counsel for the respondent has been unable to make good his argument on this aspect of the case.

15. For the reasons expressed we hold that this appeal should be allowed and the decree of the Madras High Court in A. S. No. 367 of 1958 should be set aside and the suit brought by the respondent should be dismissed in its entirety. We do not propose to make any order as to costs in this appeal.

Appeal allowed.